

***STATE OF MICHIGAN  
SUPREME COURT***

Appeal from the Michigan Court of Appeals  
Whitbeck, C.J. and Sawyer and Saad, J.J.

HERALD COMPANY, INC., d/b/a  
BOOTH NEWSPAPERS, INC. AND  
THE ANN ARBOR NEWS,  
*Plaintiff-Appellant,*

Supreme Court  
No. 128263

Court of Appeals  
No. 254712

vs.

EASTERN MICHIGAN UNIVERSITY  
BOARD OF REGENTS  
*Defendant-Appellee.*

Washtenaw County  
Circuit Court  
No. 04-117-CZ

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**REPLY BRIEF OF PLAINTIFF-APPELLANT  
HERALD COMPANY, INC., d/b/a  
BOOTH NEWSPAPERS AND THE ANN ARBOR NEWS**

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**ORAL ARGUMENT REQUESTED**

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## ARGUMENT

Plaintiff-Appellant Herald Company, Inc., d/b/a Booth Newspapers, Inc. and The Ann Arbor News (“the Ann Arbor News”) respectfully files this Reply Brief to make three points in response to the Brief of Defendant-Appellee Eastern Michigan Board of Regents (“EMU”):

- (1) In reply to EMU’s “Argument I”: Notwithstanding the lip service paid by the Court of Appeals Majority to the “clearly erroneous” standard of review, the Court of Appeals used the wrong standard of review.
- (2) In reply to EMU’s “Argument II”: The alleged public interest in concealing the Doyle letter does not “clearly outweigh” the public interest in disclosure, because EMU’s sanitized public report does not shield the Doyle letter from FOIA disclosure, and because EMU’s reliance on foreign cases is unpersuasive.
- (3) In reply to EMU’s “Argument III”: EMU fails to refute the fact the Ann Arbor News’ showing that the FOIA plainly requires, at an absolute minimum, that the *purely factual* portions of the Doyle letter must be disclosed to the public.

### I. THE COURT OF APPEALS MAJORITY USED THE WRONG STANDARD OF REVIEW.

The Ann Arbor News does not dispute that the Court of Appeals Majority correctly *named* the standard of review it was supposed to be using for the *non-factual* portions of the Doyle letter: the clearly erroneous standard. However, EMU nowhere addresses Chief Judge Whitbeck’s point: while paying lip-service to the clearly erroneous standard, the Court of Appeals Majority in truth applied a far more deferential

standard, a conflation of the “clearly erroneous” standard with the “abuse of discretion” standard. App 45a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at p 5.

Chief Judge Whitbeck faulted the Majority for deferring excessively to the circuit court’s decision in two respects. First, the Majority overzealously deferred to the circuit court based on the circuit court’s superior position to make “credibility determinations”, even though this is a FOIA case that involved no credibility determinations. *Id.* Second, the Majority cited *Federated Publications*, 467 Mich 98; 649 NW2d 383 (2002) as if that case set the standard for review in a “frank communications” exemption case, when in truth *Federated Publications* was a case which, unlike the instant case, did **not** involve the kind of “unequal balancing” required by the frank communications exemption. *Id.*

In spite of several pages of briefing about the standard of review, EMU nowhere responds to these core criticisms of Chief Judge Whitbeck about the real “abuse of discretion” standard that was being used by the Court of Appeals Majority.

Worse still, for the “purely factual” portions of the Doyle letter, the Majority plainly did **not** apply the correct standard of review . Here, the correct standard of review for the “purely factual” portions of the Doyle letter is the *de novo* standard, because what is involved is a pure legal question: since no FOIA exemption even arguably applies to the purely factual portions of the Doyle letter, what possible basis can exist for withholding those portions of the Doyle letter?

Like the Court of Appeals Majority, EMU chose not even to address this question of what the standard of review should be for the purely factual portions of the Doyle letter, presumably because EMU really has no justification whatsoever to offer for its illegal failure to separate and disclose the purely factual portions of the Doyle letter.

**II. THE PUBLIC INTEREST IN CONCEALING THE DOYLE LETTER DOES NOT “CLEARLY OUTWEIGH” THE PUBLIC INTEREST IN DISCLOSURE.**

EMU’s argument for concealing the Doyle letter has many flaws. Most egregious are EMU’s use of the sanitized public report it issued on the President’s house expenses as a shield, and EMU’s misplaced reliance on foreign cases that have neither precedential nor persuasive effect in Michigan.

EMU pretends that the Doyle letter is unimportant because of the “thousands of pages” of information contained in the sanitized public report EMU commissioned on the President’s house. However, as Chief Judge Whitbeck observed, the sanitized public report does *not* abnegate the very strong public interest in the Doyle letter, because for all its thousands of pages of pabulum, the public report does *not* contain the **facts** that are found in the Doyle letter about the cost overruns on the President’s house (“an in camera review of the Doyle letter plainly discloses that all the facts are not in the public record”). App 47a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at p 7.

EMU seeks to distract this Court from the importance of the Doyle letter by resorting to sterile arguments that elevate form over substance. For example, EMU asks the Court to “strike” the Ann Arbor News’ factual recitation – including of course the key fact which Chief Judge Whitbeck recites, i.e. that the EMU/Deloitte public report does *not* contain the information found in the Doyle letter – on the grounds that Chief Judge Whitbeck’s account of the Doyle letter is a “non-record matter.” EMU Brief, p 1, n 1.

EMU’s argument here is specious, because as in any FOIA case, the “record” here clearly includes the Doyle letter itself, which has been reviewed *in camera* by each court that has reviewed the case, and which will no doubt be reviewed by this Court as

well. Indeed, at oral argument the only person in the courtroom who will *not* have seen the Doyle letter will be undersigned counsel, who must rely upon the public Opinions of the reviewing courts to know anything about what is in the letter. But if Chief Judge Whitbeck were wrong about his assertion that the Doyle letter contains facts *not* contained in the public report, we would surely have heard EMU say so. Tellingly, EMU does not deny the truth of Chief Judge Whitbeck's cited facts. Instead, EMU claims, erroneously, that this key fact is not in the record.<sup>1</sup>

EMU also misplaces great reliance on foreign case authority. Indeed, one can read EMU's Brief for pages on end without seeing any Michigan law. All told, thirty-one federal and out-of-state cases are cited – none of which amounts to a hill of beans. As this Court has previously cautioned, the federal FOIA is worded differently than the Michigan FOIA and hence federal FOIA decisions are of limited applicability when construing exemptions to the Michigan FOIA. *Mager v Dep't of State Police*, 460 Mich

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<sup>1</sup> Interestingly, EMU itself quotes the Court of Appeals *Majority* decision for many so-called "facts" that appear nowhere in the "record" and, unlike Chief Judge Whitbeck's facts, are not even grounded in the Doyle letter itself. See, e.g., EMU Brief, pp 7-8 (where EMU strings together a series of quotations from Judge Saad, none of which have any foundation in the record, and many of which appear – with all respect -- to be nothing more than Judge Saad's private political musings).

For example, we are told – in the section of EMU's Brief that purports to be based solely on "facts" in the "record" – that "the Board is dependent upon the unvarnished candid opinion of insiders to make policy judgments and particularly to conduct sensitive investigations of top administrators." *Id.* This "fact" – if it is a fact at all – is found nowhere in the record. It's just a private musing of Judge Saad.

Likewise, and even more egregiously, in the fact section of its Brief EMU quotes Judge Saad telling us that "when a high level administrator is asked to give his opinion of the highest ranking official in the administration, the president, his immediate supervisor, whose favor he needs for job security, the insider may naturally be reluctant to trust the outsider and to trust the confidentiality of the communication." *Id.* This "fact" adduced by Judge Saad from whole air not only lacks foundation in the record, it is also just plain *false*, as Chief Judge Whitbeck observed, because the record in this case plainly discloses that in truth the particular "insider" at issue here (Doyle) had *already tendered his resignation* and hence had no need at all for the "favor" of the President whom he was criticizing so candidly. App 48a, February 15, 2005 Court of Appeals Dissenting Opinion of Whitbeck, C.J. at p 8.

Thus, unlike the Ann Arbor News' facts, which are based on Chief Judge Whitbeck's review of a record document (the Doyle letter), the private musings of Judge Saad have no foundation in the record and really should be stricken, along with the "fact" section of the EMU Brief that recites them.

134; 595 NW2d 142 (1999). Decisions from other states also fail to advance analysis of this Michigan legal issue, because the courts in those other states were interpreting FOIA statutes that are very different from the Michigan FOIA.

**III. AT AN ABSOLUTE MINIMUM, THE FOIA REQUIRES DISCLOSURE OF THE FACTUAL PORTIONS OF THE DOYLE LETTER**

The Michigan FOIA requires that any portion of a public record must be disclosed to the public, unless a public body can carry its burden of proof of establishing that a specific FOIA exemption applies to that particular portion of the public record at issue. MCL §15.233(1) (public records must be disclosed unless expressly exempted); MCL §240(1) (“burden of proof is on the public body” to show record fits within exemption); MCL §15.244(1) (non-exempt portions of records must be separated and made available).

Here, no FOIA exemption even arguably applies to the “purely factual” portions of the Doyle letter, because the only exemption asserted – the frank communications exemption – by its own express terms does not apply to “purely factual” materials. MCL §15.243(1)(m). Therefore, at an absolute minimum, the circuit court erred when it failed to order at least those “purely factual” portions of the Doyle letter disclosed.

Unpersuasively EMU seeks to avoid this result by resort to (1) misstatement of the factual record of the case, (2) distortion of the Ann Arbor News’ position, and (3) misstatement of Michigan law.

EMU misstates the factual record when it claims, incorrectly, that the circuit court found the “factual material in the Doyle letter was not severable” from the rest of the letter. (EMU Brief, pp 4-5.) In truth, what the circuit court found was that the factual material in the Doyle letter was “not EASILY severable” (App 23a, March 16, 2004 Trial

Court Op, p 3, emphasis added) – which finding is the same as an admission that the factual portions *are indeed* severable.<sup>2</sup>

EMU distorts the Ann Arbor News’ position when it claims, incorrectly, that the News “now takes the position that the exemption applies only if the entire content of the record is non-factual.” (EMU Brief, p 45.) That is not, and never has been, the News’ “position.” Rather, the News has consistently argued no more than what the FOIA says: at most, the frank communications exemption only applies (*even arguably*) to those portions of the Doyle letter that are “non-factual”, and therefore the remainder of the document – i.e., the “purely factual” portions – must be disclosed regardless of what decision is reached by this Court on the “non-factual” portions, because no FOIA exemption could even conceivably apply to those “purely factual” portions of the Doyle letter.<sup>3</sup>

EMU misstates Michigan law when it claims that MCL §15.244 “recognizes that it may be difficult or impossible” to separate exempt from non-exempt material, and in such cases “the entire document is exempt from disclosure.” There is nothing in MCL §15.244 – or indeed anywhere in the Michigan FOIA – that comes anywhere close to saying that. Very much to the contrary, MCL §15.244 requires a public body to separate

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<sup>2</sup> Again, undersigned counsel has not seen the actual Doyle letter. But if the circuit court had found the factual portions “not severable”, presumably the circuit court would have said “not severable” rather than “not EASILY severable.”

<sup>3</sup> In a truly breath-taking argument, Amicus Curiae Michigan Townships Association suggest that perhaps the “law enforcement investigation” exemption, MCL 15.243(1)(b), might apply to the Doyle letter. This argument – unpreserved in the courts below – is malarkey.

For starters, the Doyle letter does not even meet the elements of the criminal investigation exemption. There is no evidence of any law enforcement investigation into the President’s house. The Doyle letter was certainly not generated as part of a law enforcement investigation. And no investigative agency ever asserted that the Doyle letter was confidential evidence in such an investigation, or that its disclosure might jeopardize the identity of a confidential source or endanger the safety of any law enforcement personnel. Even more fundamentally, any such investigation – if there ever was one – must by now be long since complete, and thus under the terms of the law enforcement investigation exemption, any document withheld under the rubric of such an investigation would now have to be disclosed anyway.

the exempt from non-exempt material in any public record, and to produce the nonexempt material, MCL §15.244(1); and MCL §15.244 further requires that the public body shall “generally describe the material exempted” unless such a description would “reveal the contents” of the exempted material, MCL §15.244(2). Nothing in that statute comes remotely close to saying that an entire document can be exempt from disclosure just because EMU feels it’s “difficult or impossible” to separate fact from opinion.

EMU does not stop with the above-listed misstatements of fact, law and the News’ position. EMU goes on to claim, again falsely and this time without any citation at all, that “[s]elective factual data interwoven with opinion is exempt from disclosure under §13(1)(m) when its disclosure would reveal the protected communication.” There is no statute or controlling case law to support that claim. That claim is pure fantasy.<sup>4</sup>

What the law in Michigan actually says is that each portion of a public record belongs to the public, unless and until a public body can carry its burden of establishing that a specific FOIA exemption applies to those portions of a public record being withheld from the public to whom that document rightfully belongs. MCL §15.233(1); MCL §15.240(1); MCL §15.244(1). Here, no FOIA exemption applies to the “purely factual” portions of the Doyle letter, and therefore Michigan law requires that those purely factual portions, even if not “easily” severable, must nevertheless be severed from the non-factual portions of the Doyle letter and disclosed immediately to the public.

For these reasons, this Court should reverse the Court of Appeals and the Circuit Court and order, at an absolute minimum, immediate disclosure of the factual portions of the Doyle letter.

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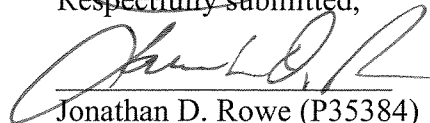
<sup>4</sup> To try to drum up support for this fantasy, EMU mentions the unpublished decision in *Barbier v Basso*, 2000 WL 3352108 (Mich App), relied upon by the circuit court. But even *Barbier* does not support EMU’s position here, for all the reasons set forth in the Ann Arbor News’ Opening Brief at pp 29-31.

#### IV. CONCLUSION

For all the foregoing reasons, and for the reasons set forth in The Ann Arbor News' Opening Brief, the Ann Arbor News respectfully requests that this Court grant the following relief:

- (1) An Order expediting proceedings in this Freedom of Information Act ("FOIA") case, as required by MCL 15.240(5);
- (2) An Order reversing the erroneous decision of the Court of Appeals;
- (3) An Order requiring Defendant-Appellee Eastern Michigan University Board of Regents ("EMU") to produce immediately an unredacted copy of the September 3, 2003 Doyle letter (the sole document at issue); and
- (4) An Order directing the Trial Court to order EMU to pay the reasonable attorneys' fees of Plaintiff-Appellant for prosecuting this FOIA case.

Respectfully submitted,



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